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In the
Supreme Court of the United States

OCTOBER TERM, 1936

No.....

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

MAZINE Z. FOX, ET AL.

No.....

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

PHILLIP LOUIS PARKS, ET AL.

No.....

HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
PETITIONER

v.

JACOB F. OTTMULLER

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Brief for the Respondents in Opposition

QUESTION PRESENTED

Whether the United States is an indispensable party defendant in actions brought "to vacate, set aside, and hold for naught" public notices and orders promulgated by the predecessor of, and now being enforced by petitioner, which are in violation of and over-ride the Constitution of the United States, Acts of Congress, constitution, statutes and decisions of the Supreme Court of the State of Washington.

STATUTES INVOLVED

The cases relate to a Federal reclamation project in the State of Washington, authorized by the reclamation law, and applicable statutes of the State of Washington. The pertinent provisions are set forth in the petition herein, and in the Appendix *infra.* pp. 31.

STATEMENT

On April 22, 1891, the Northern Pacific, Yakima and Kittitas Irrigation Company appropriated 1000 cubic feet of water per second of time of the water of the Yakima River. (U. S. vs. Union Gap Irr. Co. 209 Fed. 276). Later this appropriation was acquired by the Washington Irrigation Company, which company con-

structed the Sunnyside canal, and delivered water to the Parks land. The Ottmuller and Fox land was susceptible to irrigation by gravity flow from said canal, and said waters. In 1906 the United States, under the Reclamation Act, acquired the Sunnyside canal and water appropriations. Shortly thereafter the Secretary of the Interior determined that $10.00 per acre for the land which already had a water right (Parks land) and $52.00 per acre for the land which had no water right (Ottmuller and Fox land) would return to the reclamation fund the total cost of the project, including purchase price paid to the Washington Irrigation Company, construction of irrigation system and reservoirs, with requisite capacity to furnish all lands of respondents and all other lands within the Sunnyside division all the water necessary to beneficially and successfully irrigate the same.

Thereafter the United States entered into contract with the then owners of the Parks land, fixing the construction charges at $10.00 per acre for supplemental water right, permitting the use of sufficient water to beneficially and successfully irrigate the land. In 1909 the

Secretary of the Interior, pursuant to Title 43, USCA Sec. 419, issued public notice and order fixing construction charges on Ottmuller and Fox land at $52.00 per acre. The then owner of the Ottmuller and Fox lands made water right applications to the United States for permission to use sufficient water to beneficially and successfully irrigate their lands, and gave the United States a lien in the nature of a mortgage upon the land and water right, to secure the payment of the construction charges.

Successive Secretaries of the Interior and their representatives determined by factual investigation, that the Parks land required 6 acre feet, Ottmuller land 5.56 acre feet and Fox land 4.84 acre feet to beneficially and successfully irrigate the same, and said amount of water was, by successive Secretaries of the Interior, allocated to and permitted to be used on said lands. The United States constructed reservoirs of sufficient capacity to beneficially and successfully irrigate respondents' lands, and all lands in said division. Thereafter, and on August 13, 1914, the Reclamation Extension Act (43 USCA 469) took effect. This act provided that "No increase in construction charges

shall hereafter be made, after the same have been fixed by public notice," except by agreement. Pursuant to this act, Secretary of Interior Lane, on September 24, 1914, issued a public notice and order with reference to construction charges, which provided, "Where water right application has heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands, and therein termed 'the building charge' and will not be increased except as provided in the Reclamation Extension Act."

Respondents Parks and Ottmuller fully paid all construction charges, and government lien was released. The Sunnyside Valley Irrigation District, including the respondents' lands, was formed in 1918, and it entered into a contract with the United States by the terms of which the district assumed and agreed to pay construction, operation and maintenance charges. Thereafter the Secretary released all liens on all lands.

In 1930, Elwood Mead, Commissioner of Reclamation, wished to expedite the construction of the Cle Elum reservoir, at a cost of $3,500,000.00, to store water to irrigate lands in the

Kittitas Reclamation District, the canal and distribution system in said district being in the process of construction at that time; and also for the purpose of furnishing water to irrigate lands in the Roza and Kennewick divisions of the Yakima project, the construction of which was contemplated at that time. Mead ascertained that the cost of said reservoir was $1,000,000.00 more than the amount which would be returned to the reclamation fund from said divisions, and without consulting the respondents or officials of the district, charged to the Sunnyside division the sum of $1,000,000.00. Thereafter officials of the United States tried to persuade respondents and other water users to authorize a contract binding respondents' lands and all lands in the district, to the last faithful acre, to pay this sum, which they refused to do. For the purpose of coercing and forcing the authorization of such a contract with the district, or collecting this sum under the guise of water rentals, the basic public notice and order upon which these suits are based, was issued, on October 17th, 1930. (Ex. "E" Parks R. p34; Ex. "F" Ottmuller R. p40 and Fox R. p40). On December 11th, 1930,

the Secretary of the Interior certified to the President (Ex. "D", R. p33 Parks; and Ex. "F" R. p39 Ottmuller and Fox) that of the cost of the Cle Elum reservoir, there would be returned to the Reclamation Fund "$1,000,000.00 by rentals from the Sunnyside division of the Yakima project, and the remainder by the Roza and Kennewick divisions of the project."

The Secretary of the Interior, Commissioner of Reclamation, and District Counsel, for the purpose of forcing and coercing the respondents and other water users to authorize said contract or to pay as water rentals said sum, notified the respondents that unless they signed a new contract in the form of a water rental application (Parks R. p27, Ottmuller and Fox R. p28) to pay for all water in excess of 3 acre feet for Ottmuller and Fox, and 3½ acre feet for Parks land, that they would be deprived of all water in excess of said amount.

The public notices sought to be vacated were not issued in good faith, or by the exercise of an honest judgment, but were arbitrarily and capriciously made and enforced for the express purpose of coercing and forcing the respondents and other water users to pay $1,000,-

000.00 increased construction charges above the amount fixed by public notice in 1909, and are in excess of the power and authority conferred upon the Secretary of the Interior by the Reclamation Act, and in positive violation of said Act; that the enforcement thereof will deprive respondents of about 40% of the water rights, the absolute title to which is vested in them, pursuant to the terms of the Reclamation Act, statutes of the State of Washingon, and contracts, without any hearing, and in positive violation of the due process clause (5th Amend.) of the Constitution of the United States. (Parks R. 22 to 37; Ottmuller R. 23 to 43; Fox R. 29 to 46).

REASONS FOR DENYING THE WRIT

I.

1. There are three reasons why the case of State of Arizona vs. State of California, relied upon by the Solicitor General, does not touch the question involved in these suits.

(a) The Arizona suit involved waters of a navigable stream over which the United States has control by virtue of the commerce clause (Art. 1, Sec. 8) of the Federal Constitution. while these suits involve non-navigable wa-

ters, over which Congress has waived its rights as sovereign and has conferred the jurisdiction of such waters upon the State of Washington (Act July 26, 1866; Act July 9, 1870; Cal. Ore. Power Co. vs. Beaver P. C. Co. 295 U. S. 142).

The pivotal point upon which the decision that the United States was a necessary party rested in the Arizona case, is found in the following statements by the Court:

> "The Colorado river is a navigable stream of the United States. The privilege of the states through which it flows and their inhabitants to appropriate and use the water is subject to the paramount power of the United States to control it for the purpose of improving navigation."
>
> "Every right which Arizona asserts is so subordinate to and dependent upon the rights and the exercise of an authority asserted by the United States that no final determination of the one can be made without a determination of the extent of the other."

The source of the waters upon which respondents' water rights are based is the Yakima river, a non-navigable stream over which the United States has waived its rights as a sov-

ereign, in and to the government and control of the waters, and has conferred the jurisdiction of such waters upon the State of Washington, which state, by its Constitution (Art. 21, Sec. 1) declared that the use of waters for irrigation was a public use, and its Legislature, in the first session in 1890, passed an Act (Laws 1890 p. 706) authorizing the appropriation of the unappropriated waters of the State for the purpose of irrigation, and by Chap. 88 Laws of 1905, passed an Act entitled "Relative to the use of State Waters for Irrigation Purposes," which authorized the United States to make water appropriations the same as a private individual. The statutes of Washington (Sec. 7382 to 7391 Rem. Rev. Stat.) expressly provide that the only right which can be obtained in the waters for irrigation is by beneficial use upon the land, and that the water rights thus obtained shall be appurtenant to the land reclaimed. The United States purchased the Sunnyside canal and water appropriations from the Washington Irrigation Company and constructed reservoirs, acting solely under and subject to the irrigation and appropriation laws of the State of Washington. (State of Nebraska

vs. State of Wyoming, 295 U. S. 40).

(b) In the Arizona case, neither Arizona as a sovereign state, or her citizens, had any present rights in the unappropriated water of the Colorado river, while in these suits the respondents' rights in and to the water of the Yakima river were initiated by the appropriation on April 22, 1891, by the Northern Pacific, Yakima and Kittitas Irrigation Company, of 1000 cubic feet of water per second of time, and were consummated by the actual application to beneficial use to the extent of 6 acre feet by Parks; 5.56 acre feet by Ottmuller; and 4.84 acre feet by Fox, to their respective lands, about twenty years ago.

In the Arizona case, the Court states:

> "A justiciable controversy is presented only if Arizona as a sovereign state, or her citizens, whom she represents, have present rights in the unappropriated water of the river, or if the privilege to appropriate water is capable of division, and when partitioned may be judicially protected from appropriation by others pending its exercise."

In that case the State of Arizona sought "in advance of any act of appropriation" to obtain

a judicial decree "exempting the available water of the river or some of it, from appropriation by other states, until the indefinite time when she or her inhabitants may see fit to appropriate it," while in these suits, the respondents seek to protect water rights which are a part and parcel of their land, and are appurtenant, under the Reclamation Act (43 USCA Sec. 372), statutes of the State of Washington (Sec. 7382 and 7391 Rem. Rev. Stat.) and the decisions of the Supreme Court of the State of Washington (In re. Creb Creek and Moses Lake, 134 Wash. 7) which water rights are real estate (Madison vs. McNeal, 171 Wash. 669, 675) and their land is without value except as supplied with water (Burbank Irrigation Dist vs. Douglas, 143 Wash. 396.)

(c) The purpose of the suit in the Arizona case was to partition the *waters* of the Colorado river between the State of Arizona and the State of California, subject to the paramount right of the United States in and to those waters; while the purpose of these suits does not involve the title to water, but to *water rights*, and is to vacate, set aside, and hold for naught certain public notices and orders, promulgated

by the predecessor of petitioner, and now being enforced by him, depriving respondents of about 40% of those water rights, on the ground that the public notices and orders are not within the authority conferred upon the Secretary of the Interior by Congress, are in positive violation of the Reclamation Act, the statutes of the State of Washington, and of the Federal Constitution, in that they deprive respondents of their property, and were promulgated and are being enforced, to coerce and force respondents and other water users to pay $1,000,000.00 toward the cost of the Cle Elum reservoir, which was constructed to furnish water to other divisions.

The trial Court, in its opinion, with reference to these orders, stated:

> "The orders made by the defendant were not authorized by Congress, and had they been so authorized would have deprived the plaintiffs of vested rights. The suits are not brought against the United States, but to set aside unauthorized acts of the defendant in cases in which he has no discretionary powers, and is acting arbitrarily." (Fox R. 29; Parks R. 22.)

The United States Court of Appeals for the District of Columbia, in its opinion, stated:

> "We are confronted again by the usual contention that this is a suit against the United States, and as such cannot be maintained. This is urged on the theory that the action is one to require the specific performance of a contract with the United States. This is not an action for specific performance. It is an action to restrain the Secretary of the Interior from enforcing the alleged illegal orders issued by that officer and his predecessor in office, in his capacity as the administrative agent of the government for the construction of irrigation works, and the disposition of the same, under the Reclamation Act. (38 Stat. 690 Sec. 15; 43 USCA Sec. 373). The suit, therefor, is one against an agent of the government, and not against the government itself, since no complaint is here made by the plaintiffs, of the existing contracts between them and the government. The validity of the contracts between the government and the plaintiffs is not here in issue. The question is whether or not the orders promulgated amount to a valid and enforceable extension of the terms

of the contract."

The Solicitor General does not call attention to any Act of Congress authorizing the promulgation and enforcement by the petitioner, of the orders and notices sought to be vacated. There are none. Authority to promulgate and enforce these orders is not conferred by Acts of Congress, but they are in positive violation of the express terms of the Reclamation Act in three particulars, to-wit:

(1st) The purpose and effect of these orders is to change the measure of a water right from beneficial use as fixed by the contracts, laws of the State of Washington and Reclamation Act, and which has been determined from factual investigation by predecessors in office of petitioner, to require 6 acre feet in the Parks case; 5.56 acre feet in the Ottmuller case; and 4.84 acre feet in the Fox case, arbitrarily to 3½ acre feet in the Parks case and 3 acre feet in the Ottmuller and Fox cases.

The basic public notice of October 17, 1930, sought to be vacated, expressly states with reference to Ottmuller and Fox land, "During the year 1931 and subsequent years, and until further notice, water deliveries in that district

will be limited to 3 acre feet per irrigable acre per year." The supplemental water right contract in the Parks case, and the water right applications in the Ottmuller and Fox cases permit the use of a sufficient amount of water to beneficially and successfully irrigate their land. This is the legal measure, fixed by laws of the State of Washington (Sec. 7382 and 7391 Rem. Rev. Stat.) and by the Reclamation Act (43 USCA Sec. 372) which Act expressly provides that "beneficial use shall be the basis, the measure and the limit of the right."

(2nd) The purpose and effect of these notices and orders was to increase the construction charge on respondents' lands about 35% above the amount fixed by Secretary Garfield by public notice in 1909, in positive violation of the Reclamation Extension Act (43 USCA 469) which expressly provides that no increase in construction charges shall be made except by agreement. Respondents were notified that they would be deprived of all water in excess of 3 acre feet on Ottmuller and Fox land, and 3½ acre feet on Parks land, unless they signed a new water-rental application agreeing to pay such charges. (Ottmuller R. 28 and Parks

R. 27). The public notice of October 17, 1930, provides "All money collected for the rent of such extra water will be applied toward the payment on the unsecured portion of the construction costs of the reservoir system of the Yakima project." The certificate by the Secretary to the President (Parks R. 33; Fox R 42) stated that the cost of the Cle Elum reservoir was $3,500,000.00 and that of this amount, repayment of "$1,000,000.00 would be made by rentals from the Sunnyside division of the Yakima project, and the remainder by the Roza and Kennewick divisions of the project."

(3rd) The basic public notice of October 17, 1930, states the reason for the promulgation of the orders was to furnish water to the Kittitas division, which was an attempt on the part of petitioner to take away first rights of respondents, and give those rights to the Kittitas division, which as stated in the notice, was "beginning the use of water to which it is entitled under the contract between the Kittitas Reclamation District and the United States."

The Reclamation Act (43 USCA 523) authorizes the Secretary of the Interior to make contract with new divisions only "to an extent not

exceeding such excess capacity" of the storage or carrying capacity, and requires that "the Secretary of Interior preserving a first right to the lands and entrymen under the project." Instead of preserving a first right to the lands of respondents as required by the statute, the notice and order expressly stated that the first rights of respondents would not be preserved. The act authorizes the Secretary of the Interior to contract with the Kittitas Division only to an extent not exceeding the excess capacity of storage required to furnish respondents' land the amount of water necessary to beneficially and successfully irrigate the same.

2. The opinion of the lower Court is in harmony with American Falls Rec. Dist. vs. Crandall (82 Fed. 2nd 973) for three reasons:

(a) The orders and notices sought to be vacated by these suits were promulgated and being enforced by the petitioner as a part of his administrative duties. In the Crandall case the court said:

> "If the suit be considered one for the enforcement of purely administrative duties, such as the assessment of charges of construction, the United States would not be a necessary part."

These suits are to restrain the enforcement of orders and notices promulgated as administrative duties for the assessment of $1,000,000.00 construction charges, to pay a portion of the cost of the Cle Elum reservoir, which are not within the statutory authority conferred upon the petitioner, but are in positive violation of congressional legislation. If the United States is not a necessary party in connection with administrative duties which are performed in accordance with state laws (43 USCA 383) then certainly, when the Secretary steps entirely outside of authority conferred upon him, and acts in positive violation of the Acts of Congress (43 USCA 372 and 469) the United States is not a necessary party.

(b) The purpose of the Crandall suit was to require the physical delivery of the natural flow water, that is, the corpus of the water, while the relief asked in these suits is not the physical delivery of water, but simply to vacate the notices and orders which affect not the corpus of the water, but water rights, the title to which water rights are in the respondents.

(c) In the Crandall case, the suit was by the

district, which could not acquire a water right, for it did not own the land upon which water was beneficially applied, neither did it make the application of the water. A property right in the use of water can be obtained only by beneficial use of water upon the land, and the title thereto vests in the owner of the land. All contract rights between the United States and the respondents were fully executed. The United States constructed the reservoirs and irrigation system. The respondents gave a mortgage to the United States upon their lands and water rights, to secure the payment of the construction charges. These have been fully paid. All rights to control or pass upon respondents' rights to the use of those waters has passed from the Secretary of the Interior. (Moore vs. Robbins, 96 U. S. 530; 43 USCA 491).

3. The cases of Wells vs. Roper; Boeing Air Transport vs. Farley; Transcontinental and Western Air, Inc. vs. Farley, cited by Solicitor General, do not touch the issues involved in these suits, because in those cases, Congress had entrusted the matters at issue to the judgment and discretion of the Postmaster General, and he was acting within the statutory

authority and jurisdiction conferred upon him, in handling of the mails, which is a function of sovereignty. The United States has a property right in the mails, and an interest in their protection and transportation. In these cases the acts challenged are not within, but beyond, the scope of authority conferred upon the petitioner by Congress, and are in positive violation of the terms of the Reclamation Act. In the Shoshone Irrigation District vs. Ickes case, the plaintiff sought to control the acts of the Secretary of the Interior in matters left to his judgment and discretion by the Reclamation Act.

The Solicitor General states that a water right can be acquired only by appropriation from flowing waters of a natural stream. This statement is contrary to the statute (Sec. 7378 to 7391 Rem. Rev. Stat.) which expressly states that a water right can be obtained from water stored in a reservoir or from natural flow water, by beneficial use upon the land, and that the title to the water right so obtained vests in the owner of the land, the same in one case as in the other, and such water rights so acquired by beneficial use "shall be and remain appur-

tenant to the land or place upon which the same is used." The lower Court correctly stated the true rule under the state statute "before there can be an appropriation the water must be applied to a beneficial use." (Madison vs. McNeal, 171 Wash. 669).

The statement made by the Solicitor General to the effect "that water once diverted from flowing streams becomes, in the ditches and reservoirs of the appropriators, personalty subject to contractual disposition" is contrary to the later decisions of the Supreme Court (Madison vs. McNeal, 171 Wash. 669) and also contrary to the well settled law of the arid land states, which expressly holds that diversion and storage are not sufficient to constitute an appropriation, that no property right can be acquired in the uses of water until it has been applied to a beneficial use upon the land, and the owner of the reservoir or carrying ditch acquires no title or right to use the water and has no property rights in it subject to disposal, but such property rights of disposal is in him who applies the water to beneficial use upon the land for the purpose of irrigation. (Highland Ditch Company vs. Union Reservoirs

Company, 127 Pacific Rep. 1025; Payne Irrigation District vs. Board of Commissioners, 236 F. 790.) In the Madison case the right to the use of the flow of water stored in a reservoir was involved, and the court expressly held that the right to the use of water in its natural state, or through pipes from a reservoir, was an incorporeal hereditament, and that it was real estate. This being true, there is no necessity of assignment of right by the United States to respondents, for under these decisions and the statutes of the State of Washington, the only right which can be obtained either from the natural flow or stored water, is the incorporeal right to beneficial use, and the title to this right vests in the respondents, who actually applied the water to beneficial use upon their lands, more than twenty years ago, and *no* title vests in the United States which constructed the reservoir and irrigation system.

The statement referred to in Methow Cattle Company vs. Williams, 64 Wash. 457, was beyond the point involved and mere dicta, and under the rule announced by this court in Humphries Executors vs. United States, 295 U. S. 602, does not come within the doctrine of

stare decisis, and is contrary to later decisions (Madison vs. McNeal) of the same court. In Ament vs. Bickford, 139 Wash. 494, the court held that where a water right was being trespassed upon, the owner should be protected by an injunction.

II.

The decisions below are in harmony with a long line of decisions in this court where an executive officer has taken a step beyond the authority conferred upon him. The Tucker Act, 28 USCA 41 (20) 251 (1) affords no relief to respondents, for the reason that the orders and notices were pormulgated without any statutory authority, and as stated in Langford vs. United States, 101 U. S. 341-345, "For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court." In this case the court denied recovery for the use of buildings owned by a private citizen, which were seized by an Indian Agent. In the case of Schillinger vs. United States, 155 U. S. 162, this court held that the Court of Appeals had no jurisdiction of an ac-

tion against the United States for the wrongful use of a patent for the reason it was founded upon a tort.

The questions raised by these cases have been fully and carefully considered by this court in numerous decisions, and the law is well established by an unbroken line of authorities. No new question is involved. The two questions raised are:

Has the Secretary of the Interior the right to issue an edict in the form of a public notice and order, depriving the respondents of about 40% of their water rights, without any notice or process, for the purpose of forcing them and other water users to pay increased construction charges to the extent of $1,000,000.00, over-riding the Constitution of the United States, Acts of Congress, statutes and decisions of the State of Washington?

Do such public notices and orders so promulgated have such sancity that they cannot be reviewed in the Federal courts under Art. 3, Sec. 2 of the Federal Constitution, and vacated in the interest of justice?

The purpose and effect of the public notices

and orders are:

1. To change the measure of the water right from beneficial use as fixed by Congress (43 USCA 372) arbitrarily to 3 and 3½ acre feet. If permitted to stand, these orders override this act of Congress.

2. To increase the construction charges from the amount fixed by public notice at $52.00 per acre for Fox and Ottmuller land and by contract at $10.00 per acre for Parks land, without consent of respondents, in positive violation of the express terms of the Reclamation Extension Act (43 USCA 469) and in positive violation of the public notices promulgated by Secretary of the Interior Lane on September 24, 1914, to the effect that there would be no increase. If permitted to stand, these orders over-ride this act of Congress, and also the determination made by a former Secretary of the Interior, thereby over-riding decisions of the Federal court. (Wilbur vs. Burley Irrigation Dist. 58 Fed. 2nd 871; Noble vs. Union River Logging Co. 147 U. S. 165.)

3. To deprive respondents of about 40% of their water rights which are incorporeal hereditaments, whether the water is from natural

flow of the Yakima river or stored in reservoirs; and are real estate (Madison vs. McNeal, 171 Wash. 669, 675) the title to which became vested in respondents and are part and parcel of their land and appurtenant thereto by beneficial use thereon, to the extent of 6 acre feet on Parks land and 5.56 acre feet on Ottmuller land and 4.84 acre feet on Fox land, under decision of the Supreme Court of Washington (134 Wash. 7, 12) and statutes of Washington (Sec. 7391 Rem. Rev. Stat.) under which the United States was acting in the purchase of the Sunnyside Canal and irrigation system and construction of reservoirs (State of Nebraska vs. State of Wyoming, 295 U. S. 40) and also by terms of the Reclamation Act (43 USCA 372) in violation of the 5th Amendment of the Constitution of the United States. If permitted to stand, these orders over-ride the Constitution and become the "Supreme Law of the Land."

This Court has reviewed many such orders and without exception has held them void. The rule is succinctly stated in State of Colorado vs. Toll (268 U. S. 228, 69 Law Ed. 927), as follows:

> "If an executive officer, federal or state, is committing or is about to commit acts unauthorized by or in violation of law, to the irreparable injury of the property rights of another, such act or threatened action is good ground for injunctive relief against such officer."

And the reason for the rule is clearly stated in American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94, 47 L. Ed. 90, page 96, as follows:

> "Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld."

Some of the leading cases where this rule is firmly established are as follows: Noble vs. Union River Logging Co., 147 Wash. 164; Garfield vs. Goldsby, 211 U. S. 249; Ballinger vs. United States, 216 U. S. 240; Lane vs. Watts, 230 U. S. 525; Lane vs. Hoglund, 244 U. S. 174; Payne vs. Central Pacific Railroad, 255 U. S.

228; Wilbur vs. United States ex rel Krushnic, 280 U. S. 306-319; Ickes vs. Colorado Development Co., 295 U. S. 639.

If certiorari is denied and these cases remanded for trial, no witnesses are necessary, for there is no issue to be tried. These cases are based upon public notics and orders issued by the Secretary of the Interior and a certificate made by him to the President, copies of which are attached to the amended bills, all of which are public records. The Court of Appeals has answered all and the only questions involved, namely: Can the Secretary of the Interior change the measure of a water right from beneficial use which requires 6 acre feet on the Parks land, 5.56 acre feet on the Ottmuller land and 4.84 acre feet on the Fox land, arbitrarily to 3½ acre feet on the Parks land and 3 acre feet on the Ottmuller and Fox land, where the contracts, statutes of the State of Washington, and Reclamaion Act provide that beneficial use is the measure? Can the Secretary of the Interior increase the construction charges upon respondents' lands after the same have been fixed by public notice, when the Reclamation Extension Act (43 U. S. 469)

expressly denies him that right? Both questions were answered by the trial court and the appellate court in the negative. There is no other issue involved in these suits which it is necessary to try. These facts can be established by certified copies of the government records at Washington, D. C., and cannot be denied.

I submit that the decisions below are correct. That there is no conflict of authority, and that the same are sustained by many decisions of his court. The petitions should be denied.

Respectfully submitted,

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Attorney for Respondents.

September, 1936.

APPENDIX

UNITED STATES CODE ANNOTATED, TITLE 43

SEC. 419. *Contracts for Construction—Public Notice of Irrigable Lands—Limit of Area—Charges per Acre* * * *—Upon the determination that any irrigation project is practicable, the Secretary of the Interior may cause to be let contracts for the consruction of the same, in such portion or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portion or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project. * * * (June 17, 1902, 32 Stat. 389).

SEC. 469. *Restrictions on Increasing Con-*

struction Charges * * *—No increase in the construction charges shall, after August 13, 1914, be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water right applicants and entrymen to be affected by such increase. * * *

SEC. 491. *Reclamation Fund to Be Used for Operation and Maintenance—Management of Works to Pass to Landowners—Title.*—The Secretary of the Interior is authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this chapter; provided, that when the payments required by this chapter are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior. * * * (June 17, 1902, 32 Stat. 389).

SEC. 7390. *Reservoir Permits—Applications for Secondary Permits*—All applications for reservoir permits shall be subject to the provisions of Sections 7378 to 7385, both inclusive. But the party or parties proposing to apply to a beneficial use the water stored in any such reservoir shall also file an application for a permit, to be known as a secondary permit, which shall be in compliance with the provisions of Sections 7378 to 7385, both inclusive. Such secondary application shall refer to such reservoir as its source of water supply and shall show documentary evidence that an agreement has been entered into with the owners of the reservoir for a permanent and sufficient interst in said reservoir to impound enough water for the purposes set forth in said application. When the beneficial use has been completed and perfected under the secondary permit, the state hydraulic engineer shall take proof of the water users under such permit and the final certificate of appropriation shall refer to both the ditch and works described in the secondary permit and the reservoir described in the primary permit.

SEC. 7391. *Water Appurtenant to Land* * * * *. The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used. * * *